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No. 80

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

MURPHY OIL COMPANY, a Corporation,
Petitioner,

vs.

DAVID BURNET, Commissioner of Internal Revenue,
Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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The brief of the respondent injected several new and affirmative matters into this case which could not be adequately refuted within the limited time of oral argument. In view of the fact that petitioner received respondent's brief less than a week prior to the argument, petitioner respectfully prays that this Court will permit this brief to be filed and considered.

The affirmative matter demanding refutation divides into two categories.

I—HISTORY OF TAX PAYMENTS

The respondent went off the record before this Court in order to color the case in a manner prejudicial to petitioner. We refer to page 5 of respondent's brief where the unwarranted assertion is made that in the absence of proof it may be assumed that petitioner did not pay any income tax on the bonus. If the subject is open to inference, the presumption is certainly the other way—that a tax was paid if required by law. As a matter of fact any proof offered on this point would properly have been held inadmissible. Actually, the whole subject is immaterial in the instant case, but respondent's assertions demand answer because of respondent's position that the petitioner is making an "opportunistic" argument. Appendix C of respondent's brief, and the statement of respondent's counsel at the argument served to correct to some extent the prejudicial assertions in respondent's brief, but the only method of complete clarification is to outline the taxation history of the petitioner:

Originally, petitioner returned the bonus as income for 1913 to the extent of $1,108,600.97, being the payment received in 1913 less an amount assigned to the transfer of personal property. An audit by the government in 1915 resulted in $1,446,637.19 additional net income on account of the bonus, the theory of this audit was that the bonus was selling price and that there should be offset against it the value of the property at January 1, 1909 (Regulations 33, dated January 5, 1914, released for publication February 12, 1914, Articles 107, 108, 109, 110 and 111. See also Treasury Decisions 2005, 2090 and 2137). The tax paid on account of the bonus in both years was $25,562.38. It was then realized that the petitioner being on an accrual basis, the whole bonus should be income in 1913. In 1920 $25,238.20 additional tax on this theory was assessed, but no demand being made, was never paid.

For the year 1918, petitioner paid a tax of $164,000.00 due entirely to respondent's changed treatment of the bonus, lowering the depletion allowance.

If petitioner prevails in this case, it has underpaid its 1913 tax about $28,000.00 but overpaid its 1918 tax $164,000.00.

If respondent prevails, the 1918 tax is correct, but petitioner would have overpaid its 1913 tax by $23,096.14.

The inference sought to be drawn by respondent is that petitioner somehow escaped income tax on the bonus, and now that the statute of limitations has run against a tax thereon on the theory that it is income, petitioner seeks to treat the bonus as income.

The above history shows conclusively that the petitioner has not been an inequitable, crafty, opportunistic seizer of technicalities, but that it simply endeavored to pay its taxes as the law required. Respondent's several changes in theory in respect to the taxation of bonuses, leaves the petitioner in the unenviable position of being out of pocket even if successful in the present litigation.

We grant that the above facts do not appear in the record. Neither do the corresponding assertions in the respondent's brief. We feel that it is only fair to the petitioner to follow up the respondent's discussion of an immaterial issue with all the facts in regard thereto.

II—REENACTMENT OF REGULATIONS

On page 12 of his brief, respondent argues that the depletion clause having been reenacted without change during a thirteen year period in which the Regulations provided for depletion regardless of extraction, Congress must be taken to have approved the Regulations.

This is a different note from that sounded by respondent in the brief in which he, in conjunction with petitioner, sought the writ of certiorari to review the instant case:

"The proper treatment of cash bonuses paid to lessors of mining properties presents a problem of administration that has resulted in considerable confusion and inconsistent practice within the Treasury Department. * * *

"Prior to its amendment in 1926, the Commissioner applied the rule of the original regulation to a large number of cases, but we are informed that subsequently, so far as possible, the Commissioner modified his treatment of these cases, and by agreement or otherwise applied to them either the rule announced by the Board or that stated in the amended regulation. While it is likely, therefore, that no cases are now pending in which the Commissioner is insisting on the application of the original regulation, we are informed that there are a large number of cases now pending in which the Commissioner has attempted to treat a bonus either as partially income and partially a return of capital (following the amended regulations) or as entirely income (following the decision of the Board in this case). We are also informed that since the decision of the court below, which seems to sustain the amended regulation, the Commissioner, so far as possible, has held all cases in abeyance, pending a possible decision by this Court in the present case so as to avoid further uncertainty and confusion in administration.

"It is therefore important that this Court resolve all doubts with respect to the proper method of handling cash bonuses in cases of this kind and establish a rule which will serve to guide both taxpayers and the Treasury Department in cases to arise in the future and to permit uniform disposition of pending cases." (Pages 4 and 5, Respondent's brief on petition for certiorari.)

Moreover the claim now made is not in accord with the facts. The first time respondent claimed the bonus was other than income was in 1921. Respondent then asserted that it was capital (Reg. 45, Art. 215). Respondent now

argues that this was perfectly consistent with the amendment of the above regulation in 1926. Actually the 1921 regulation was on a sale theory, and did not even purport to be depletion. Another radical shift in 1926 was the introduction of the formula involving royalties expected to be received. The difference between these theories which is so lightly passed over by the government means thousands of dollars to taxpayers, and the difference in result is proof of inconsistency of the Treasury Department.

Actually only two Revenue Acts have been adopted since the amended regulation went into effect—the 1928 and 1932 Acts. The 1921, 1924 and 1926 Acts were enacted while the original regulation was in effect and before the amended regulation went into effect and may be said, by reason of the argument based on legislative approval, to have constituted an approval of the regulation. Consequently this argument by reference to legislative re-enactment is of no value.

The cases cited by respondent do establish the principle that in some circumstances reenactment indicates Congressional approval, but the governing facts of the leading case are so different from those of the case at bar as to actually make it an authority against legislative approval in the instant case. We refer to *National Lead Company* vs. *U. S.*, 252 U. S. 140. There the regulation in question had been *constantly* employed for forty years, and Congress had reenacted the statute four times during that period.

Similar elements of consistency of practice, ambiguous statutes and repeated reenactments, making the other cases cited by respondent much stronger for the theory of legislative approval than the case at bar are readily apparent.

The respondent relies upon the earlier (1919) promulgation of the regulation allowing depletion on minimum royalties. To avoid collateral issues we shall not pause over distinctions between minimum royalties and bonuses which readily suggest themselves. It suffices to say that, assuming the two regulations are alike in disregarding extraction as the measure of depletion, and granting that Congress has approved the minimum royalties regulation, it is a complete *non sequitur* that Congress likewise approved a different regulation which had been subject to change. The Congressional approval is based not upon the common element of disregard of extraction, but upon the element of consistent, well-established rules, which is not present in the bonus regulation.

III—CONSTRUCTION OF THE PHRASE "SUCH REASONABLE ALLOWANCE IN ALL THE ABOVE CASES TO BE MADE UNDER RULES AND REGULATIONS TO BE PRESCRIBED BY THE COMMISSIONER WITH THE APPROVAL OF THE SECRETARY."

It is respectfully suggested to the Court that the above phrase is similar to the phrase used in Section 240 of the Revenue Act of 1918. That phrase has been construed in *Temptor Corn and Fruit Products Co.*, 299 Fed. 326, affirmed *Schlafly v. U. S.* 4 Fed. (2d) 195, C.C.A. 8th (1925) in which it was held that the Commissioner had no authority to make regulations limiting affiliations to cases in which there was ownership or control of 95% or more of the outstanding stock. The Court said:

> " * * * But the question of the fact of affiliation is left by the very definition of what constitutes affiliation, even in the statute itself, a matter of judicial construction, and not a matter of administrative or departmental regulation. * * * So it is too obvious for

argument that it is not left to the Commissioner to prescribe what constitutes affiliation, for the statute fixes that, but what is left to be prescribed by the Commissioner's regulation is the manner of the making of the return."

The principle enunciated in the *Temptor* case was followed in other cases. *News Pub. Co. v. Blair,* 29 Fed. (2d) 955 (App. D.C.) (1928); *Lafayette-South Side Bank v. Commissioner,* 33 Fed. (2d) 646 (App. D.C.) (1929).

The following sections of the Revenue Acts provide specifically for the making of rules and regulations by the Commissioner:*

1918 Act	1921 Act	1924 Act	1926 Act	1928 Act	1932 Act
		203(b)(5)	203(b)(5)	112(f)	112(f)
		204(a)(9)	204(a)(9)	113(a)(9)	113(a)(9)
203	203	205	205	22(c)	22(c)
204(b)and (c)	204(b)and (c)	206(b)and (h)	206(b)and (g)	117(b)— 169— 187	117(b)— 169— 187
	206 (c)	208(e)	208(e)	168	168
		209(c)	209(c)	185	185
213(b)(7)(a)	213(b)(7)(a)	213(b)(7)(a)	213(b)(7)(a)	116(d)(1)	116(d)(1)
214(a)(10)	214(a)(10)	214(a)(9)	214(a)(9)	23(l)	23(l)
	214(a)(11)	214(a)(10)	214(a)(10)	23(n)	23(n)
214(b)	214(b)	214(b)	214(b)	213(a)	213(a)
	217(e)	217(e)	217(e)	119(e)	119(e)
		217(g)(2)	217(g)(2)	215(b)	215(b)
225	225(b)	225(b)	225(b)	142(b)	142(b)
		226(d)	226(d)	47(d)	47(d)
234 (b)	234(b)	234(b)	234(b)	232	232
	238(e)	238(e)	238(e)	131(f)	131(f)
240 (a)	240(a)	240(a)	240(a)	141(b)	141(b)
255	255	255	255	150	149
256	256	256	256	148(a)	147(a)
250 (g)	250(g)	282(b)	285(b)	147(b)	146(b)

* And see Magil, Finality of Determinations of the Commissioner of Internal Revenue, 28 Col. L. R. 563 at 564 and 30 Col. L. R. 147.

IV—CONSTRUCTION OF THE PHRASE "ACCORDING TO THE PECULIAR CONDITIONS IN EACH CASE."

It is respectfully urged upon this court that the word "case" as used in the above quotation is used in the same sense as used immediately previously in the same statutory provision and means the several cases therein cited, viz., mines, oil and gas wells, other natural deposits, and timber. This phrase does not justify the treatment in a peculiar or a different manner of taxpayers receiving a bonus.

Respectfully submitted,

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